U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: December 11, 2000

CASE NOS.: 2000-ERA-33
2000-ERA-34

In the Matter of

BRIAN AND OLGA KOHRT,
Complainants

v.

CULLIGAN OF FLORIDA,
Respondent

RECOMMENDED DECISION AND ORDER APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT AND WITHDRAWAL OF COMPLAINT

This proceeding arising under the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, ("ERA"); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610, ("CERCLA"); the Safe Drinking Water Act, 42 U.S.C. § 300j-9[i] ("SDWA"); the Toxic Substance Control Act, 15 U.S.C. § 2622, ("TSCA"); and the Water Pollution Control Act, 33 U.S.C. § 1367, ("WPCA"); and the implementing regulations found at 29 C.F.R. 24, (collectively, the "Acts").

Brian and Olga Kohrt filed complaints with the Occupational Safety and Health Administration ("OSHA"), alleging they had been retaliated against for engaging in protected activity. A compliance investigation was conducted by the Atlanta, Georgia, Occupational Safety and Health Administration, (OSHA). On July 18, 2000, OSHA announced its determination that complainants had engaged in protected activity and were discriminatorily discharged. By letter dated July 26, 2000, respondent requested a hearing before an administrative law judge.

I was assigned the matter on August 3, 2000 and a hearing was scheduled for November 28, 2000. On November 21, 2000, Counsel for the Respondent informed me that the case had been

settled. By order dated November 22, 2000, I directed the parties to submit the settlement documents by the close of business on November 30, 2000. On November 30, 2000, I received a facsimile of the settlement agreement. I received the original executed settlement agreement on December 11, 20000, for approval.

The Part 24 Regulations do not contain any provision relating to a dismissal of a complaint by voluntary settlement. Therefore, it is necessary to refer to the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18, which rules are controlling in the absence of specific provision at Part 24.

Part 18.9 allows the parties in a proceeding before an administrative law judge to reach agreement on their own. 29 C.F.R. Part 18.9(a)-(c). The parties must "notify the administrative law judge that the parties have reached a full settlement and have agreed to dismissal of the action." 29 C.F.R. Part 18.9(c)(2). Once such notification occurs, the administrative law judge shall then issue a decision within thirty days if satisfied with the agreement's form and substance. 29 C.F.R. Part 18.9(d).

The Judge must review the settlement agreement to determine whether its terms are a fair, adequate and reasonable settlement of the complaint. *Bonanno v. Stone & Webster Engineering Corp.*, 97 ERA 33 (ARB 6-27-97). Moreover, review and approval of the settlement is limited to matters arising under the employee protection provisions under the jurisdiction of the Department of Labor, in this case the Energy Reorganization Act. *Mills v. Arizona Public Service Co.*, 92 ERA 13, (Sec'y Jan. 23, 1992); *Anderson v. Kaiser Engineers Hanford Co.*, 94 ERA 14 (Sec'y Oct. 21, 1994).

The settlement agreement contains a provision that "should any provision of this Agreement, set forth herein be declared illegal or unenforceable by any court of competent jurisdiction, such that it cannot be modified to be enforceable, such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect." When an agreement contains a saving provision, the remainder of the agreement may be approved without the offending language. *Brown v. Holmes & Narver*, 90-ERA-26 (Sec'y May 11, 1994); *Macktal v. Secretary of Labor*, 923 F.2d 1150 (5th Cir. 1991). Therefore, under this provision, I am able to sever a portion of the agreement which I find contrary to public policy and the settlement will still be effective.

The parties have included language in the agreement to the effect that respondent denies any violations and that nothing in the agreement should be construed as an admission of liability or any unlawful conduct of any kind. The parties agree that the agreement does not constitute an adjudication or finding on the merits. This recommended decision and order shall not be construed as indicating my view on the merits of this entire matter. The complainant agrees to a general release of all claims against Culligan arising out of employment or contractual relationship with Culligan.

I interpret the language of the agreement regarding waiver of complainant's rights as limited to a waiver of complainant's right to sue in the future on claims or causes of actions arising out of facts occurring before the date of the settlement. *See, Tan v. Deborah Research Institute*, 94-ERA-31 (Sec'y Nov. 28, 1994), *Bittner v. Fuel Economy Contracting Co.*, 88-ERA-22 (Sec'y June 28, 1990); *Polizzi v. Gibbs & Hill, Inc*., 87-ERA-38 (Sec'y July 18, 1989); *Ryan v. Niagara Mohawk Power Corp.*, 87-ERA-47 (Sec'y Jan. 25, 1990).

The agreement provides a general release of all complaints that could have been alleged under various state and federal laws. This approval is limited to the settlement of matters under the laws within the jurisdiction of the Department of Labor. *Mills v. Arizona Public Service Co.*, 92-ERA-13 (Sec'y Jan. 23, 1992); *Pace v. Kirshenbaum Investments*, 92-CAA-8 (Sec'y Dec. 2, 1992); *Priest v. Baldwin Assoc*., 84-ERA-30 (Sec'y Dec. 19, 1991).

The parties agree that the settlement agreement shall be governed by the laws of the State of Florida. Provision for interpretation under state law does not limit authority of Secretary or United States District Court. *Rivera v. Bristol-Myers Barceloneta, Inc*.**,** 93-CAA-3 (Sec'y June 28, 1993);*McGlynn v. Pulsair Inc.*, 93-CAA-2 (Sec'y June 28, 1993); *Elliot v. Enercon, Services, Inc*.**,** 92-ERA-47 (Sec'y June 28, 1993); *Ratliff v. Airco Gases***,** 93- STA-5 (Sec'y June 25, 1993).[1]

The agreement contains a provision designating the agreement as confidential. However, the confidentiality provision may be limited by the Freedom of Information Act, ("FOIA"), which requires agencies to disclose requested documents unless they are exempt from disclosure. *See*, 29 C.F.R. Part 70. If a FOIA request is made for this settlement agreement, the agency would have to respond and decide whether to exercise its discretion to claim any applicable exemption. *See, Darr v. Precise Hard Chrome*, 95-CAA-6 (Sec'y May 9, 1995); *Drouillard v. Detroit Edison*, 94-ERA-1 (Sec'y May 1, 1995); *Ing v. Jerry L. Pettis Veterans Affairs Medical Center*, 95-ERA-6 (Sec'y May 9, 1995); *England v. Raytheon (Ebasco Contractors, Inc.)*, 95-ERA-21 (Sec'y May 1, 1995). Therefore, although the settlement agreement is designated as confidential, FOIA may limit the release of information at a future date.

The agreement provides that "complainants agree not to disclose, in any form or to any individual or entity (including, but not limited to, any labor organization), any trade secrets, privileged, confidential or proprietary information related to respondent's business operations which they may have

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[1] In *Stites v. Houston Lighting & Power***,** 89-ERA-1 and 89-ERA-41 (Sec'y May 31, 1990), the Secretary interpreted a provision of a settlement agreement providing in part " that any civil action or other litigation arising out of or resulting from a breach or violation or alleged breach or violation of this [Settlement] Agreement, shall be controlled by the laws of the State of Texas" as not restricting in any way the authority of the Secretary to bring an enforcement action under 42 U.S.C. §§ 5851(d), nor as limiting in such action the jurisdiction of the district court to grant all appropriate relief as identified in the statute. *See also, Bivens v. Louisiana Power & Light*, 89-ERA-30 (Sec'y July 8, 1992); *Pace v. Kirshenbaum Investments***,** 92-CAA-8 (Sec'y Dec. 2, 1992)

acquired in the course of their employment with respondent." The agreement further states that complainant's consent to entry of an injunction to preclude further disclosure. The agreement limits complainants' right to voluntarily assist other individuals or entities in bringing claims against respondent. It also provides that complaints waive the right to provide such assistance unless compelled by subpoena or court order. The agreement requires that complainants may provide information pursuant to a valid subpoena or court order if they first notify respondent of the proposed disclosure in a timely manner so respondent can seek a protective order.

The above provisions could be considered as "gag" provisions which are unacceptable as being against public policy if they preclude complainants from communicating with federal or state enforcement agencies concerning alleged violations of the law. *Thorlon v. Burlington Environmental & Phillip Environmental*, 94-TSC-2 (Sec'y Mar. 17, 1995).[2] Therefore, to the extent that the above provisions limit complainants from communicating with federal and state enforcement agencies concerning alleged violations of the law, I find the provisions void as against public policy.

I find the Settlement Agreement to be fair, adequate and reasonable settlement of the complaint.

Accordingly, it is hereby RECOMMENDED that the Settlement Agreement between Complainants, Brian and Olga Kohrt, and Culligan of Florida, be APPROVED and that the matter be DISMISSED WITH PREJUDICE.

RICHARD A. MORGAN
Administrative Law Judge

RAM:EAS:dmr

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative

[2] *See also, The Connecticut Light & Power Co. v. Secretary of the United States Dept. of Labor*, 85 F.3d 89, 95-96 (2d Cir. 1996), where the court affirmed the Secretary's holding that a settlement agreement containing a provision that attempts to restrict an employee's ability to cooperate with administrative and judicial bodies violates section 210 of the ERA.

Law Judge. *See 29* C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).